FILED
SEP 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 8[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTMANN & WELBORN,
Petitioner,

v.

U.S. DEPARTMENT OF ENERGY, *et al.*,
Respondents.

REPLY BRIEF OF PETITIONER

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The Brief for the Respondents in Opposition ("Response Brief") blithely ignores the following fundamental and dispositive facts:

1. The government sponsored a symposium in August 1973 for the *express announced purpose* of providing guidance to regulated firms regarding newly-issued regulations.

2. The government official upon whose advice petitioner relied was designated by the government as its *principal* spokesman at that symposium it sponsored, and the official was duly authorized to respond to inquiries.[1]

[1] "This symposium was sponsored by the Office of Oil and Gas, and I was its principal speaker." Affidavit of Duke R. Ligon on page 1433 of the Record on Appeal ("Rec.").

3. Both the official in question and the agency intended that petitioner and others similarly situated rely on the advice given at that symposium.[2]

4. The agency communicated to petitioner at that meeting the then-existing *official* policy of the Cost of Living Council as it applied to the specific circumstances presented by petitioner: ". . . the official policy of the Cost of Living Council, for whom I was a spokesman at the Dallas meeting, was that fields unitized for purposes of enhanced recovery would be considered to qualify for 'new oil' pricing." Ligon Aff. at Rec. 1434-35.

5. Petitioner's view of the regulations was hardly "inconsistent with the regulations as they stood at that time," as disingenuously stated by the government. The record below is clear: "The Oil Policy Committee and I were well aware that unless such fields were permitted to qualify for 'new oil' pricing, operators were not likely to invest the additional capital necessary to increase the oil flow from those fields. We believed this incentive crucial to expanding domestic supplies in a short time frame because enhanced recovery was the most expeditious method of increasing domestic oil supplies in short order." *Id.*

6. The foregoing policy remained the *official* view of the agency for the following two years, and the agency was well aware that petitioner was proceeding on that under-

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[2] The suggestion that Mr. Ligon was not authorized to speak for, or act on behalf of, the Cost of Living Council is sheer nonsense. Mr. Ligon served at the time as Executive Secretary of the Cabinet-level Oil Policy Committee and Chairman of the Working Group of the Oil Policy Committee. He stated that, "[i]n fulfilling my responsibilities at both the Treasury and Interior Departments as well as the Oil Policy Committee, I was one of the most senior government officials involved in setting policy for the Cost of Living Council regulations applicable to the oil and gas industry. When the Federal Energy Administration was created in December 1973, I was appointed Assistant Administrator for Policy Planning and Regulation. In that position, I was responsible for formulation of the crude oil price and allocation regulations promulgated by that agency." Ligon Aff. at Rec. 1433.

> standing. "The enhanced recovery pricing issue was discussed occasionally over the next year and a half that I was involved with the Cost of Living Council/FEA regulations applicable to oil production, but was not changed to my knowledge (and I was in a position to know of any such change), at any time prior to acceptance of my resignation in February 1975. Obviously, the policy embodied in Ruling 1975-15, issued on September 4, 1975, is different from the policy initially adopted by the Cost of Living Council." *Id.* at 1435.

The government makes much of the fact that the dispositive advice here was not in writing. Yet, they do not dispute that, at the government-sponsored symposium, petitioner "got the best advice that could be obtained at the time from any governmental source." Pet. App. 5a. "[I]n the fall of 1973, it would have been impossible for anyone in the petroleum industry to have obtained any sort of formal written interpretation of petroleum pricing regulations from the Cost of Living Council ("CLC"). Formal written interpretations were not being provided by any CLC personnel or, to my knowledge, by any other government officials." Affidavit of Sigmund L. Sklar, former Chief of the Case Analysis Branch of the Energy Division of the Cost of Living Council. Rec. at 1413.[3] This case hardly resembles *Schweiker* v. *Hansen,* 450 U.S. 785 (1981), where the Court was concerned with oral representations by hundreds, if not thousands, of Social Security Administration employees who received "untold numbers of oral inquiries" each year. Here, a senior government official acting with apparent, if not actual, authority provided specific guid-

[3] *See also* the Affidavit of the agency's former Regional Director: "[T]here was no method of obtaining a so-called official interpretation and no written interpretations were being provided by the Washington, D.C. office of CLC to assist the petroleum industry in its efforts to comply with crude oil price regulations." Rec. at 1417. The government was quite cognizant of this reality and for that very reason sponsored the seminar at which the advice here in issue was given.

ance to petitioner at a forum expressly sponsored by the agency for that purpose.[4] No disclaimer whatever was made by the government, and the subsequent assertion that only written interpretations could be relied on cannot diminish the reasonableness of the earlier reliance.

The government now says, "The joke is on you. You shouldn't have trusted us." This position is hardly "worthy of our great government. . . ." *Brandt* v. *Hickel,* 427 F.2d 53, 57 (9th Cir. 1970), *cited with approval in Heckler* v. *Community Health Services,* ____U.S.____, 104 S. Ct. 2218, 2224 n.13 (1984). The government demand that petitioner now pay a penalty of over $5 million for having relied upon earlier authorized representations is hardly a "joke."

Finally, we note that the petitioner requested that, if the Court does not immediately determine to grant the instant petition, the Court defer resolution until such time as it may consider an identical issue presented in the petition to be filed in *United States* v. *Exxon Corp.,* Nos. DC91-100 (Consolidated) (Temp. Emer. Ct. App. July 1, 1985). The government maintains that deferral is inappropriate because petitioner *somehow* will be able to protect its interests on remand. The government is incorrect. Petitioner will be required in the very near future to put in excess of $5 million into an escrow account, and to forego such monies until such time as the agency has acted on the lower court remand. Should the remand in this case be determined before the Court reviews the

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[4] Nor are the facts of this case similar in any way to *Heckler* v. *Community Health Services,* ____ U.S. ____, 104 S. Ct. 2218, 2227 (1984), where the Court emphasized that "respondent prepared those reports on the basis of an oral policy judgment by an official [an insurance intermediary] who, it should have known, was not in the business of making policy. That is not the kind of reasonable reliance that would even give rise to an estoppel against a private party. It therefore cannot estop the Government." Moreover, this was hardly a case where "a private party seeks to spend the Government's money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds." *Id.* at 2225.

petition for *certiorari* filed by Exxon, petitioner's monies will be irretrievably lost by payment to as yet unspecified third parties. Under these circumstances the petitioner can hardly "protect its interests." The underlying controversy here has extended for a decade. The government can offer no legitimate reason why the Court should not defer the resolution of this petition, should the Court so wish, for an additional and very limited period of time.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 27th day of September, 1985, three copies of the Reply Brief of Petitioner were mailed, first class postage prepaid, to:

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I further certify that all parties required to be served have been served in accordance with subsections .3. and .4.(a) of Supreme Court Rule 28.

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